

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

Criminal Writ Petition No.158 of 2007

Mohammad Hussain Mahida Petitioner

Versus

1. Chandra Iyenger,
The Principal Secretary to the
Government of Maharashtra, Home Deptt.,
(Preventive Detention) and detaining
Authority, Mantralaya, Mumbai.

2. The State of Maharashtra

3. The Superintendent of Mumbai,
Central Prison, Mumbai.

4. The Superintendent of Nasik Road,
Central Prison, Nasik. Respondents

Mrs.A.M.Z. Ansari for Petitioner.

Mr.D.S. Mhaispurkar, Additional Public Prosecutor with
Mr.S.R. Borulkar, Public Prosecutor for Respondent No.2-
State.

CORAM : DR.S. RADHAKRISHNAN &

SMT.ROSHAN DALVI, JJ.

Date of reserving the judgment : 9th October, 2007

Date of pronouncing the judgment : 22nd October, 2007

JUDGMENT : (Per Smt.Roshan Dalvi, J.)

1. This Petition is filed by the brother of the detenu detained

under order No.PSA-1206/64/SPL- 3(A), dated 21.8.2006 for a writ of habeas corpus for quashing and setting aside the said order. The detenu arrived in Mumbai by flight from Dubai on 27.4.2006. He did not make the requisite declaration under Section 77 of the Customs Act, 1962 (the said Act), declaring the dutiable goods in his baggage. He was carrying 565 of Titan wrist watches and 35 kgs. of saffron in his baggage. The total worth of the said dutiable goods initially put by the Customs Authorities was in the range of Rs.17,00,000/- . The detenu delivered his gate pass, collected his baggages and came out of the custom area when he was intercepted by the officers of DRI.

2. He was arrested and produced before the concerned Magistrate who remanded him to judicial custody. He was released on bail on 9.5.2006.
3. He made an offer to purchase the said goods at 5% more than the value placed on the goods by the DRI officers on 7.6.2006. He requested them not to confiscate the goods but to strictly adhere under the provisions of Section 150 of the said Act in that behalf.
4. He admitted having committed an offence of evasion of duty by not declaring his dutiable goods to the Customs Officers upon his arrival from Dubai on 27.4.2006, punishable under Section 135 (1)(a) of the said Act. Upon making such admission, he made an application for

compounding the said offence on 26.6.2006.

5. In June 2006, the said application was sent to the Assistant Director, DRI by the Assistant Commissioner of Customs before whom it was made.
6. The detenu was directed to file an affidavit that he would comply with the rules for allowing the compounding of the offence. He accordingly, made such an affidavit under an application made before the Court of the learned Additional Chief Metropolitan Magistrate, Esplanade, Mumbai on 7.7.2006.
7. He was issued a show cause notice by the Additional Collector of Customs on 19.10.2006.
8. He replied to the show cause notice on 6.6.2007.
9. The detenu had challenged the value of duty put upon the goods by the Customs Authorities. His contention in regard to the value was considered by the Customs Authorities. The value came to be reduced initially under an Addendum/Corrigendum dated 14.5.2007 issued to the Show Cause Notice dated 19.10.2006. The value of the goods came to be reduced from Rs.17,63,000/- to Rs.14,43,503.33. The detenu further challenged the duty leviable in his reply to the Show Cause Notice dated 6.6.2007. He has relied upon and annexed thereto a commercial invoice for 565 Titan watches valued at Rs.41,935/- .

10. The impugned detention order sets out the factum of the detenu arriving in Mumbai on 27.4.2006 and being intercepted by the DRI Authorities. It also mentions the Titan watches and saffron brought in by the detenu. The main contention in the detention order is that the detenu did not fill in column- 5 of the Customs gate pass relating to the value of dutiable goods being imported by him. Accordingly, it was held that he had smuggled the aforesaid goods into India without paying Customs duty. His case for smuggling fell under Section 111(l) of the said Act.
11. Since the detenu has admitted the offence committed by him and applied for compounding of the offence, the detailed contents of his statements recorded under Section 108 of the said Act on 28.4.2006 and thereafter need not be reproduced or considered. It has been the case of the detenu in his statement as well as in Court that he carried a business as tour operator. It is argued by Mrs.Ansari on his behalf that he had, at times, carried the articles of passengers/customers in the said tour. The articles seized from him in this case are not stated by him to be of his customers in any of the aforesaid letters written or applications made by him.
12. Based upon such admitted facts, the Detaining Authority came to a subjective satisfaction that the the detenu having been apprehended in the manner aforesaid, carried

smuggling activities which are prone to repetition and which require an order of detention to be passed since he was engaged in smuggling activities as defined in the Customs Act.

13. The main contention on behalf of the detenu is that his application for compounding under Section 137(3) of the said Act and the affidavit filed in regard thereto as well as his letter offering to purchase the smuggled goods at 5% more when the dutiable amount under Section 150 of the said Act are vital documents which would make the Detaining Authority come to a particular subjective satisfaction of the case. Those vital documents were not placed before the Detaining Authority and hence, the detention order suffers from the vice of non-application of mind. It is the case of the Respondents that the fact that the detenu admitted his guilt and applied for compounding the offence was placed before the Detaining Authority and hence, the specific documents in that behalf do not assume significance. These documents are required to be considered for the prosecution of the detenu before the learned Additional Chief Metropolitan Magistrate, Esplanade, who was seized of the prosecution. It is further contended that the extent that compounding or the purchase of the goods at 5% more than the dutiable amount are not the matters for the consideration of the Detaining Authority. Copy of the letter of the detenu offering to

purchase the amount was forwarded by the Commissioner of Customs to the Assistant Director of the DRI since that matter pertained to the work of that department.

14. It is contended on behalf of the detenu that it is not enough for the Sponsoring Authority to place on record before the Detaining Authority only the factum of the admission of guilt by the detenu and the consequent application for compounding of offence or the offer of purchase of the goods. It is further contended by Mrs. Ansari that the said statement before the Detaining Authority should have been accompanied by the necessary documents which are annexed as Exhibits E and F to the Petition. It is, therefore, contended that what has been placed before the Detaining Authority is in a truncated form and would not allow the Detaining Authority to come to a proper subjective satisfaction of the case considered as a whole. It is also contended that since the Detaining Authority knew the fact that the detenu had made an application for compounding the offence, she should have called for the application, the affidavit filed in the trial Court and the relevant particulars. That having not been done, it must be concluded that she did not apply her mind to the entire facts of the case as a whole.

15. We may mention that in this case the detenu, admittedly, came to India by flight from Dubai on 27.4.2006. He was

admittedly arrested a few hours thereafter on 28.4.2006. He has made a statement under Section 108 of the said Act. The crux of the statement is admitted and that is his case before this Court also. The detenu has admitted the fact that he, having brought in the aforesaid items without making the requisite declaration relating to his baggage under Section 77 of the said Act, has admitted that fact, sought to plead guilty to the charge and made an application for compounding the offence. He has also offered to purchase the goods at slightly higher price. These facts are essential to be considered in the criminal prosecution of the detenu. These facts would certainly enable the learned Magistrate to come to the conclusion about the illegality of the act of the detenu as also the character of the detenu in admitting the offence committed so as to determine the extent of sentence/fine to be imposed upon the detenu upon his conviction. These facts relate to the particular case in which the detenu sought to avoid payment of duty by non-declaration of the dutiable goods completely and the fact that he offered to pay duty upon being intercepted and caught. These aspects may also be a pointer to the culpable mental state of the detenu, which is even otherwise presumed under Section 138A of the said Act. These aspects have no bearing upon the profession of the detenu, upon his repeated acts of like nature and upon his propensity for repetition in future.

This would not take into account the fact that the detenu may have committed the same offences when he was not intercepted and caught on earlier occasions.

16. The passport of the detenu shows numerous flights undertaken by the detenu to and fro India. This shows that the detenu had even earlier travelled in similar fashion. It is unknown whether at that time the detenu smuggled the goods as he did on this occasion and which he has later admitted. The admitted fact that the detenu is a tour operator and travels often to and fro Dubai is a material fact. The Detaining Authority would be concerned with those aspects. The detention order also shows the involvement of none other than the one Customs officer whose mobile number has been traced from the mobile of the detenu. The statement of the detenu, as reproduced in the detention order, shows the conspiracy between the detenu and the said Customs officer, a fact which has otherwise not been denied. The Detaining Authority would rightly consider herself with these aspects. It is not for her to consider whether the detenu compounds the offence and if so, by what amount. That would not allow her to come to any subjective satisfaction about whether the detenu committed such offences in the past or he would be prone to commit such offences in future.

17. The documents to be relied upon and considered by the

Detaining Authority are, therefore, quite different from those to be relied upon and to be considered in the criminal prosecution by the learned Magistrate. The fact of the detenu admitting his guilt and making an application to compound the offence is only relevant, without more. Since those are not the vital documents to come to the conclusion as to whether or not the detenu could be detained, showing precisely those documents would not take the case of the detenu any further.

18. It is argued on behalf of the detenu that the detenu had placed the value of duty payable by him at Rs.7,87,500/- in place and stead of the duty of Rs.17,63,000/- placed by the DRI Officer upon consignment of the detenu in his baggage, for which no declaration was made by the detenu. It is his further case that based upon his application for reconsidering the extent of duty payable, the Addendum/Corrigendum came to be issued on 14.5.2006. The amount of duty in that corrigendum has also not been accepted by the detenu resulting into his reply to the show cause notice for further de-valuation of the duty. The detenu has placed reliance upon the commercial invoice showing value of the goods hitherto undeclared. As required under the law, that may be a relevant document to determine the amount of duty payable by the detenu upon the offence. It would be required for no other purpose. That would be of no

assistance whatsoever to the Detaining Authority in considering whether or not the detenu deserved to be detained to prevent such occurrences in future. These documents also are, therefore, not vital documents for the Detaining Authority to come to any conclusion.

19. The detenu has not shown a single document not considered by the Detaining Authority which should have been considered by her relating to the admitted offence and the admitted transaction. The documents required for other Enforcement Officers or for the learned Magistrate are not the documents required for the purpose of detention. Hence, the case of the detenu that the detention order suffers from non-application of mind because the vital documents were not placed before her has to be rejected.

20. The further case of the detenu is that the representation made by the detenu came to be rejected by the Advisory Board. A subsequent representation made by the detenu also came to be rejected without considering the aforesaid Addendum and the further reduction in value of the goods claimed by the detenu. It is contended on behalf of the detenu that after the offer to pay the value of the goods by purchasing the goods at enhanced rate and after reduction of the duty, the detention order itself would not be required to be passed. It is further contended that the normal law of the land was adequate and, therefore, there is no necessity

to incarcerate the detenu under the preventive detention law. The argument is misconceived. The further representation of the detenu dated 13.6.2007 made by the detenu pursuant to his right under Article 22(5) of the Constitution of India has been considered and rejected after due consideration. It may be mentioned that the detenu has been informed of the said rejection by the Under Secretary, Government of Maharashtra, Home Department, by his letter dated 3.7.2007.

21. Mrs.Ansari drew our attention to the judgment in the case **Kamleshkumar Ishwardas Patel vs. Union of India & ors.** (1995) 4 Supreme Court Cases 51 in this regard. We may mention that in that case the Joint Secretary, Home Department did not consider the representation made by the detenu at all. He himself forwarded the representation to the Central Government with his recommendation that the same may be rejected. The representation was rejected by the Central Government. It was held that it was for him to take an independent decision on the representation and that he not having taken that, it resulted in non-compliance of the provisions contained in Article 22(5) of the Constitution of India and rendered the detention illegal. We do not see how that judgment can apply to the facts of this case in which the representation has been considered by the Home Department of the Government of Maharashtra itself.

22. It is further contended before us that there was delay in considering the said representation. The representation of the detenu dated 13.6.2007 was sent by the Jail Authority on 14.6.2007 and received by the Home Department on 15.6.2007. It has been rejected on 3.7.2007. The Petitioner has taken exception to the 18-day period for the said rejection. Mrs.Ansari also contended that consideration of the representation was so long delayed as to vitiate it.
23. The affidavit of the Respondents shows the exception of this period of 18 days for considering the representation. It may be mentioned that the Detaining Authority against whom the Petition is essentially filed was transferred by the time the representation came to be made. One officer of the Home Department, Government of Maharashtra, passed the detention order and the other officer considered the representation of the detenu. The additional affidavit filed by the present Principal Secretary (Appeals & Security), Government of Maharashtra, Home Department, shows that upon receipt of the representation on 15.6.2007, a note was put up on 16.6.2007 and forwarded to the Under Secretary who gave his endorsement on the same day. It was also forwarded to the Deputy Secretary, who gave his endorsement on the same day. Parawise comments were called for from the Sponsoring Authority also on the same day. The Sponsoring Authority considered the

representation between 16.6.2007 and 25.6.2007. The representation related to the valuation of the duty and its de-valuation pursuant to the Addendum/Corrigendum. It may be mentioned that the Sponsoring Authority would be concerned in the criminal prosecution against the detenu. The detenu having admitted the offence and sought to compound it was liable to pay the duty upon such compounding. The extent of the duty was challenged and the Addendum came to be issued. That Addendum was also challenged. The show cause notice of the Sponsoring Authority came to be replied after more than 8 months by the detenu. That reply was made to the Sponsoring Authority. The time taken by the Sponsoring Authority to his parawise comments, therefore, related to the factum of the application for compounding as also the extent of the duty payable upon such compounding. The time taken for that purpose by the Sponsoring Authority is, therefore, not unreasonably long or delayed.

24. The Sponsoring Authority forwarded his parawise comments on 25.6.2007, which were received in the Home Department on 29.6.2007. It is contended, and rightly, that the time taken of 4 days for this purpose when the two Authorities are at a distance of hardly 3 Kms. is exorbitant. In today's time when the official communication is expected and required to be made electronically, considering the

infrastructure provided by the Government for that purpose, the period of 3 days may not be required or justified. However, it is not such an exorbitant delay as to render the order of detention nugatory.

25. Upon the receipt of the parawise comments of the Sponsoring Authority in the Home Department, the Assistant to the Principal Secretary prepared a detailed note on 29.6.2007 itself. He forwarded it to the Under Secretary for his endorsement on the same day. The Under Secretary forwarded it to the Deputy Secretary also on the same day. Thereafter the file was forwarded to the Principal Secretary, deponent of the affidavit, who rejected the same after careful and independent consideration on 2.7.2007. The said rejection was communicated to the detenu the next day on 3.7.2007.

26. The entire chronology shows active steps diligently taken by each of the officials. The relevant endorsements have been made for calling for the parawise comments as well as for making note thereupon by 3 officers on one day itself. The Sponsoring Authority and the Detaining Authority, who were required to give their comments and take the decision, naturally took time to consider. 9-day time taken by the Sponsoring Authority for considering the representation to give his parawise comments and 3-day time taken by the Detaining Authority to come to the ultimate conclusion show

neither delay nor procrastination. The representation of the detenu had to be considered on merits in the light of his plea of guilt, the application for compounding, the offer to purchase the higher amount and the challenge to the extent of duty before and after the Addendum/Corrigendum came to be issued by the Sponsoring Authority. He specially had to consider the actual figures. The Detaining Authority had to reconsider these aspects to ultimately conclude whether or not the “normal law of the land” would be sufficient or was at all material to the question before her of detaining or releasing the detenu. She further had to consider the show cause notice issued since as far back as on 19.10.2006 and its reply given as late as on 6.6.2007 and whether it had anything to do with the aspect of detention alone with which she was concerned.

27. We do not consider the period of 18 days on the whole for this exercise to be inappropriate or excessive. Hence, the contention of the Petitioner that the representation of the detenu was not considered in time and hence, the detenu should be released also must be rejected.

28. We may mention that though as many as 14 grounds are mentioned in the Petition, the aforesaid are the only grounds which are pressed before us.

29. We find no substance in any of those grounds. The detention order, therefore, cannot be set aside. The Petition

is rejected. Rule stands discharged.

(DR.S. RADHAKRISHNAN, J.)

(SMT.ROSHAN DALVI, J.)